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Nos. 84-237, 84-238 and 84-239

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, *et al.*, Appellants,

v.

BETTY-LOUISE FELTON, *et al.*, Appellees.SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION,
Appellant,

v.

BETTY-LOUISE FELTON, *et al.*, Appellees.CHANCELLOR OF THE BOARD OF EDUCATION OF
THE CITY OF NEW YORK, *Appellant,*

v.

BETTY-LOUISE FELTON, *et al.*, Appellees.

On Appeal From The United States
Court Of Appeals For The Second Circuit

**BRIEF OF AMERICANS UNITED FOR
SEPARATION OF CHURCH AND STATE AND
G. HUGH WAMBLE AS AMICI CURIAE**

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INTEREST OF AMICI CURIAE

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through the enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution.

Americans United has a membership of some 50,000 members of various religious beliefs and some of no religious beliefs in all states of the United States, including the State of New York. Americans United is involved in extensive litigation of

First Amendment Free Exercise and Establishment issues throughout the United States.

Americans United is particularly interested in the issues raised in this case because the decision may directly affect two cases in which Americans United is currently participating. Those cases are *Wamble v. Bell*, United States District Court, Western District of Missouri, Western Division, Civil Action No. 77-0254-CV-W-8, which is presently awaiting a decision on the merits; and *Barnes v. Bell*, United States District Court for the Western District of Kentucky at Louisville, Civil Action No. C-80-0501-L(B). Both of these cases involve challenges under the Establishment Clause of the First Amendment to Title I of the Elementary and Secondary Education Act of 1965. In fact, in the brief of the Secretary of Education filed in the instant action, both the *Barnes* and *Wamble* cases are specifically referenced (see Brief for the Secretary of Education, p. 10). In addition, the brief of the government has referred to studies which specifically involve the Missouri Title I program (See Brief for the Secretary of Education, p. 10, n.7 and pp. 10 and 11, n.9).

Dr. G. Hugh Wamble is the plaintiff in *Wamble v. Bell*, *supra*. Note is made of the fact that the Question Presented is stated in broad terms—that being whether Title I of the Elementary and Secondary Education Act of 1965, which authorizes federal funding of remedial education for educationally deprived children (in public or private schools) in low income areas violates the Establishment Clause of the First Amendment insofar as it authorizes the funding of secular remedial classes taught by public school teachers under public school control on the premises of religious schools.

A decision in this action may well have a direct bearing on plaintiff Wamble's suit in Missouri. These amici will contend that the providing of teaching services on the premises of church-operated schools violates the Establishment Clause of the First Amendment to the United States Constitution.

INTRODUCTORY STATEMENT

Although the appeal in this case only directly involves New York City's Title I program, appellants have chosen to broadly state the question presented in order to obtain a response from this Court as to whether Title I violates the Establishment Clause of the First Amendment when public school teachers provide the services on the premises of religious schools. Although not revealed in any of the briefs of the appellants, almost all of the Title I services currently provided throughout the nation to nonpublic school students are administered on the premises of nonpublic schools. Thus, a decision in this case will have national impact.

Unfortunately, this case goes up on a paper record devoid of many of the facts which should be in the possession of the Court when deciding a constitutional question of this magnitude. Americans United for Separation of Church and State and G. Hugh Wamble respectfully submit that a fuller record would be more desirable.¹

This case does not simply present the Court with the responsibility of resolving disputes among private parties—rather, it involves the determination of issues impacting one way or another on a large segment of our population and perhaps establishing or affecting principles of law of great importance to church-state contacts.

This suit does not merely seek to clarify the meaning of the law remitting the parties to private ordering of their affairs,

¹ Unlike the instant case, in *Wamble v. Bell* the court devoted 21 days to trial and on March 30, 1983, provided a full day for oral argument. During the course of the trial 23 live witnesses testified, and the court received additional testimony in the form of depositions from 35 witnesses. In addition, approximately 800 documents were offered and received into evidence. One of the issues directly presented to the court involved the action taken by the Commissioner of the United States Department of Education as a result of the report furnished to the Commissioner which is referred to in the Brief for Secretary of Education at pp. 10 and 11, n.9.

but itself establishes a regime ordering the future interaction of the parties and of absentees as well.

It is respectfully submitted that this case requires the Court to take judicial notice of matters not formally of record in the pending litigation. See *Wilson v. Sigler*, 285 F.2d 372, 383 (8th Cir. 1961), and *United States v. Verlinsky*, 459 F.2d 1085, 1089 (5th Cir. 1972).

It is further suggested that this is an appropriate circumstance for the Court to take judicial notice of proceedings in other courts within the federal judicial system, particularly since reference has been liberally made concerning studies in Missouri which directly impact on the case of *Wamble v. Bell*, *supra*. See *St. Louis Baptist Temple, Inc. v. Federal Deposit Insurance Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).²

SUMMARY OF ARGUMENT

The Court of Appeals has faithfully followed the prior decisions of this Court in reaching its opinion that the New York Title I program providing remedial education at taxpayers'

² Judicial notice may even be taken of briefs filed in other courts, *United States v. Walters*, 510 F.2d 887, 890, n.4 (3d Cir. 1975), including amici briefs since they are matters of public record, and their contents are subject to scrutiny and analysis by the Court. *Happy Investment Group v. Lakewood Properties, Inc.*, 396 F.Supp. 175, 183, n.6 (N.D. Cal. 1975). In fact, notice may be taken by the Court of public records lodged with governmental agencies, *White v. Califano*, 437 F.Supp. 543 (D. S.D. 1977). Amici will, in this brief, from time-to-time, refer to the record in the United States District Court for the Western District of Missouri in *Wamble v. Bell*. In this regard, it should be noted that the evidence referred to will relate to testimony by officials of the United States Department of Education and of documents authored or received by them. The purpose of these references is not to prove or disprove the claim of the plaintiff in *Wamble v. Bell* but to bring to bear on the broad issue presented to the Court factual information necessary for a constitutional determination. *Weaver v. Palmer Brothers Co.*, 270 U.S. 402, 410 (1925). Citations to "___ testimony, ___ Tr ___" are to the transcript of the trial of *Wamble v. Bell*, *supra*. Relevant pages from the transcripts or exhibits referred to are annexed hereto as an Appendix to this Brief and referred to as "___a."

expense on the premises of church schools violates the Establishment Clause of the First Amendment.

Not only was the Second Circuit correct in its application of the prior decisional law, but any other conclusion would ignore reality and defy logic. An analysis of the result of validating this type of a program clearly reveals that the providing of instruction in sectarian schools would create a continuing danger of future undetected advancement of religion at taxpayers' expense. In addition, this program fusing secular education at taxpayers' expense with religious education would directly advance the educational ministry of the sponsoring church, thus resulting in an application of public funds in a manner having the primary effect of advancing religion.

The on-premises Title I program also creates numerous entanglement problems which result from the shared use of the same church-school facilities and the overlapping jurisdiction over the same students during the school day. This arrangement is pregnant with dangers of government intrusion into the institutional affairs of religious institutions without any effective means of monitoring against constitutional abuse.

The prior holdings of this Court suggest that where there are various alternatives available in the providing of federally-supported services, and there is a potential for church-state entanglement, the least entangling alternative should be sought in administering such a program. For this reason, Title I services made available to students attending nonpublic schools should be provided at religiously-neutral sites. Such an arrangement will not only reduce the possibility of the program advancing religion and creating excessive entanglement, but will also maximize the benefit of the services to nonpublic school students who would otherwise be denied the entitlement because they are not enrolled in a religious school where the church and state have entered into a partnership.

Although appellants claim that the prior holdings of this Court concerning aid to pervasive sectarian schools are not applicable to the religious schools in New York where Title I services are provided because of a claimed variation from the

Meek profile, such defense must fail. This Court has repeatedly indicated that it will not be wedded to a formal list of criteria for determining whether a church-operated elementary or secondary school is pervasively sectarian.

The fusion of government-sponsored education with the religious educational ministry provided on the premises of church schools with the ever-present religious atmosphere violates the Establishment Clause of the First Amendment and must be struck down. Title I services should be provided both to public and nonpublic school students, but not in violation of First Amendment rights.

ARGUMENT

I. THE OPINION OF THE COURT OF APPEALS IS FULLY SUPPORTED BY THE PRIOR DECISIONS OF THIS COURT.

When reduced to the simplest terms, the core issue in this case is whether a federal program utilizing public school teachers to provide educational services within church-operated schools is a violation of the Establishment Clause of the First Amendment to the United States Constitution.

Every analysis in this area of constitutional inquiry must start with a consideration of the cumulative criteria developed by this Court over many years. In its consideration of cases implicating the Establishment Clause over the past two decades, this Court has developed three criteria by which to measure the constitutionality of a government act or action:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . , finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

Later, in *Committee for Public Education v. Nyquist*, 413 U.S. 756, 783-785, n.39 (1973), this Court amplified the meaning of the "primary effect" standard:

Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. . . . Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton*, in which the plurality found that the mere possibility that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might, "*in part* have the effect of advancing religion." 403 U.S., at 638 (emphasis supplied). . . .

[S]ecular objectives, no matter how desirable and irrespective of whether judges might possess sufficiently sensitive calipers to ascertain whether the secular effects outweigh the sectarian benefits, cannot serve today any more than they could 200 years ago to justify . . . a direct and substantial advancement of religion.

In *Lemon v. Kurtzman*, *supra* at 602, the Court delineated the meaning of excessive entanglement. It ruled that Rhode Island's Salary Supplement Act, which authorized salary supplements for non-public school teachers who taught only those courses offered in the public schools, violated the First Amendment. This Court noted in *Lemon*, *id.*, at 618:

Several teachers testified, however, that they did not inject religion into their secular classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential if not actual hazards of this form of state aid.

This Court in *Lemon* added that the Court need not assume that parochial school teachers will be guilty of bad faith or have any conscious design to evade First Amendment limitations and said:

We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to

make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.

Id. at 618-619.

It makes no constitutional difference that the teachers are not employed by a religious organization or directly subject to the direction and discipline of religious authorities. These facts were found to be irrelevant in *Meek v. Pittenger*, 421 U.S. 349, 370-371 (1975). In *Meek*, the remedial reading teachers were not employed by a religious organization or subject to direct religious authority. Like the instant case, the teachers in *Meek* were public school employees providing remedial reading services on the premises of church schools. Nevertheless, this Court said that this:

. . . does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. . . . [citation omitted] But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. . . . [citation omitted] The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to insure that those restrictions were being followed.

Id. at 371-372.

Later this Court in *Wolman v. Walter*, 433 U.S. 229, 247 (1977), which also involved public school employees, stated that the constitutional danger arose because the services performed by the publicly employed personnel were rendered in the pervasively sectarian atmosphere of the church-related school. The *Wolman* Court observed that "[t]he danger existed there, not because the public employee was likely

deliberately to subvert his task to the service of religion, but rather because the pressures of the environment [not of the parochial school principal] might alter his behavior from its normal course." *Ibid.* See also *Public Funds for Public Schools v. Marburger*, 358 F.Supp. 29, 40 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974)

The most recent decision of this Court involving the Establishment Clause, *Lynch v. Donnelly*, 104 S.Ct. 1355 (March 5, 1984), has neither cast aside the three-part *Lemon* test nor repudiated *Meek* or *Wolman*. In fact, this Court in *Lynch*, reaffirmed many of its prior decisions, including *Lemon*, *Nyquist*, and *Meek*.

In *Lynch*, this Court discussed the Court's previous differentiation between an on-premises shared-time program found unconstitutional in *McCullum v. Board of Education*, 333 U.S. 203 (1948), and an off-premises released-time program determined constitutional in *Zorach v. Clauson*, 343 U.S. 306 (1952). *Id.* at 1363-1364.

II. LOGIC CONFIRMS THE PRIOR HOLDINGS OF *MEEK* AND *WOLMAN*.

The Second Circuit Court of Appeals viewed the sparse summary judgment record and correctly observed that the ever-present potential for advancing religion was present in this case. The Court of Appeals noted that children in 51 of the 231 nonpublic schools received remedial instruction from public school teachers who regularly taught in such schools. The Court also noted that many of the Title I teachers taught in schools which shared their own religious affiliation.

This Court in *Meek* was concerned that "the pressures of the environment might alter . . . [the teachers'] behavior from its normal course." 433 U.S. at 247. The remarkable perception of this Court in *Meek* seems to be supported by Monsignor John J. Leibrecht who writes:

Frequently enough when one speaks about distinctive qualities of the Catholic school, the word "atmosphere" comes up. The school has some sort of intangible thing

called atmosphere. It comes not from the physical facilities, or the religious classes, or the students—at least not chiefly. The most distinctive and valuable thing the Catholic school can offer to parents is its faculty—even more important than the religion classes themselves to the totality of curriculum.

* * *

When the student comes into the Catholic school, he somehow becomes involved in the faculty's own Christian community life. Just as a child, for good or for bad, gets caught up in the life of the family to which he pays an extended visit, so the student is influenced by the faculty's Christian community life. The atmosphere of the Catholic school, no less real because it is intangible is the spirit created by the common Christian life conscientiously lived by the faculty and participated in by the students.

Leibrecht, "Thoughts on the Catholic School," *The Catholic Educator*, 27 at 28, 33 (May, 1966).

If a student can become subsumed in the atmosphere of the church school, the Court is rightly concerned with the potential for subtle pressures being exerted upon teachers of common religious faith by the sponsoring church.

Professor Donald A. Giannella described a similar concern embraced in the Court's decision in *Meek v. Pittenger*, *supra*:

... as a recent study of Catholic parochial education points out [Notre Dame Report, Catholic Schools in Action, 17 (R. Neuwien ed. 1966): "the very presence of the religious [teachers and administrators] is in itself a dominant, unforgettable symbol." This pervasive atmosphere makes on the young student's mind a lasting imprint that the holy and transcendental should be central to all facets of life. It increases respect for the church as an institution to guide one's total life adjustments and undoubtedly helps stimulate interest in religious vocations.

In short, the parochial school's total operation serves to fulfill both secular and religious functions concurrently, and the two cannot be completely separated. Support of any part of its activity entails some support of the dis-

qualifying religious function of molding the religious personality of the young student.

Giannella, "Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle," 81 Harv. L. Rev. 513, 574 (1968).

We believe that the decision in *Meek* prohibiting public school teachers from conducting classes within the church schools is not only logical but necessary if the Establishment Clause is to be effective. Parochial schools are not open to as much public scrutiny as public schools. Public schools include teachers and students of varying religious persuasions as well as those who may be strongly opposed to any form of religion. The public school's business is, in fact, public, and its governing boards are answerable to the voters. There is a diversity of religious and philosophical views represented on the boards and in the administration of the public schools not found in church schools. There is thus a built-in surveillance system which is usually present at the public school.

Conversely, in the church-operated school, the regular classroom teacher, the student or parent would not be so apt to blow the whistle on violations which may occur in the Title I room since sectarian teaching and activity are expected and accepted parts of the remainder of the school program.

Because of this readily apparent distinction between public and parochial schools, there is a greater likelihood that future violations would be more easily left undetected in the church school where those in attendance or control may not be at all sensitive to the concept of religious neutrality. This, in part, justifies decisions of this Court which reject aid programs on the basis of the "potential" or "danger" of violations rather than awaiting later exposures of unconstitutional application where funds have already been disbursed and the wrong has already been done.

Meek teaches that in sectarian schools where there is no internal built-in mechanism for surveillance³ such as exists in public schools, there can be only one way of insuring the religious neutrality of a governmentally-financed program: an all pervasive and ever watchful governmental monitoring program which raises separate constitutional concerns as to excessive entanglement.

³ There is no statutory restriction whatever on the activities of Title I personnel teaching on church school premises. Federal Title I regulations are also devoid of any limitation or restrictions on the activities of Title I teaching personnel. Even if there were legislative or regulatory restrictions, there has not been any monitoring program set up to ferret out violations of the Establishment Clause. One of the counsel for the intervenor-defendants in the instant action, in commenting on this and other Title I cases, observed:

That there are problems of a constitutional dimension in some of the pending Title I cases is significant for two reasons. First, we had assumed, somewhat naively, that the Title I program we defended in New York was a model of Title I instruction around the country. What we have discovered is that there are great deviations from the PEARL model, and in my view, the greater the deviation, the greater the risk the program will fail.

* * *

The second problem that has been disclosed by these deviations is that the policing of Title I is really very loose. There is virtually no monitoring at the federal level. At the state level, so few resources are allocated for Title I administration that each local school district is substantially free to do as it wishes. A consequence of this is the greater burden it places on diocesan and archdiocesan school officers to scrutinize the way Title I is being implemented within their particular jurisdiction and to discover incipient problems that could be intercepted before a lawsuit is filed.

Wilson, "ESEA Title I Litigation—A National View," *The Catholic Lawyer*, Sept. 1982, 231 at 235.

Mr. Wilbert A. Cheatham, Director of Compensatory Education for the United States Department of Education, and the person who had general administrative responsibility for Title I throughout the nation, was called by the government to testify in *Wamble v. Bell*, *supra*. Mr. Cheatham testified that in the United States, as a whole, federal personnel visit and monitor less than 1% of the 14,000 local educational agencies each year (Cheatham testimony, 11 Tr 149) (13a) due to the availability of only 70 to 125 persons to do the monitoring throughout the country (Cheatham testimony, 12 Tr 46) (19a).

Under general provisions applicable to Title I, there is a statutory requirement that nothing in Title I "shall be construed to authorize the making of any payment . . . for religious worship or instruction." 20 U.S.C. § 3384. This, however, leaves the Title I teacher whose "professionalism" is the remaining protection against church-state violations, pretty much at sea.⁴ More precision is required to prevent the otherwise inevitable disagreement as to when a teacher has crossed the constitutional barrier.

The appellants have attempted to distinguish this case from *Meek* on the basis that the services are provided in a religiously neutral classroom⁵ set apart from the rest of the church school—a religiously neutral oasis where religious objects have been removed.

It is difficult to discern why a "desanctified" room within a church school which itself maintains instructive religious objects, curriculum, programs, and characteristics should provide less opportunity for the fostering of religion.

⁴ Federal auditors who testified in *Wamble v. Bell* found nothing in the federal regulations about what religious neutrality means (Livingston testimony, 14 Tr 65) (36a-37a). They came to the consensus view that Title I instructors should not provide "the class with various religious articles," not say "mass in the same room they are giving Title I," and that there should be no altars (Livingston testimony, 14 Tr 66) (37a). Although the program had been in operation for a number of years, out of nine schools investigated, the federal auditors found crucifixes on the Title I room walls of two schools in St. Louis, a religious picture on the wall of another room used for Title I, and a covered altar in a Title I classroom in Jefferson City (Livingston testimony, 14 Tr 66) (37a).

The auditor, however, failed to include these violations as a part of his report because after speaking with his Regional Inspector General he "felt that it to be not significant" (Livingston testimony, 14 Tr 66-67) (37a-38a).

⁵ According to Wilbert A. Cheatham, there is no federal definition of "religiously-neutral" setting (Cheatham testimony, 11 Tr 150) (13a-14a). He further testified in *Wamble v. Bell*, *supra* that he would not know what to look for, and on-site Title I personnel would have to make the judgment about such a setting. (*Id.* at 150-151) (13a-15a).

III. A TITLE I PROGRAM CONDUCTED ON CHURCH SCHOOL PREMISES HAS THE EFFECT OF AIDING RELIGION.

To be sure, this aid program was designed to assist students, but so has every other aid program which has been struck down by this Court. If the program is a public benefit, no child should be excluded because of his or her parents' religious beliefs and practices. The Title I program is often defended against Establishment Clause attack on the basis that it is provided to the student and not the church school. However, unlike the bus transportation benefit validated in *Everson v. Board of Education*, 330 U.S. 1 (1947), the decision for the student to receive benefits is initially made by the school rather than the parent, and it is this arbitrary decision which determines if a nonpublic school student will be able to participate in the Title I program.⁶

When Title I services are provided only to students enrolled in a church school, and in a room which is physically an integral part of that school, another evil arises. As Professor Laurence Tribe argued:

Apart from the significance of symbols in establishing precedents for more dangerous incursion, the fact of symbolic governmental identification with a religious activity must be understood to constitute a separate evil in a system that regards matters of religious concern as ultimately delegated to individual and community conscience.

Tribe, *American Constitutional Law*, § 14-12 at 868 (1978).

To an impressionable student, even the appearance of secular involvement in religious activities may be a symbolic influence too dangerous to permit. *Brandon v. Board of Educa-*

⁶ Wilbert A. Cheatham testified in *Wamble v. Bell*, *supra*, that if a nonpublic school does not elect to participate in the Title I program, perhaps because of its beliefs against receiving government aid, a child otherwise eligible for Title I benefits, but attending such a nonpublic school, would not be served by Title I. In fact, according to Cheatham, most Seventh-day Adventist schools elect not to participate (Cheatham, testimony, 12 Tr 114-122) (24a-31a). See *infra* p. 18 for entanglement implications.

tion, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 454 U.S. 1154, (1981). See also *Widmar v. Vincent*, 454 U.S. 263, 273, n. 13 (1981).

Title I programs conducted within church schools inevitably tend to merge into the overall religious educational programs of the schools in which they operate. Parents and the community perceive the Title I program as part of the school curriculum.

The fusion of governmental and sectarian activity within the bosom of the church school itself carries with it the high risk that the program will be perceived as an endorsement of religion. See *Lynch v. Donnelly*, 104 S.Ct. 1355, 1368 (March 5, 1984) (O'Connor, J., concurring).

Appellants have attempted to justify the Title I program on the basis of the "child benefit" theory. In *Committee for Public Education v. Nyquist*, *supra*, this Court struck down a program that was a "hybrid" between a tax credit and a tax deduction. The Court in *Nyquist* rejected the "child benefit" theory offered in justification for the program and held that the tax benefit had "the impermissible effect of advancing the sectarian activities of religious schools." *Id.* at 794. This Court in *Nyquist* stated:

The controlling question here, then, is whether the fact that the grants are delivered to parents rather than to schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation" required by the Constitution. It is true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents: as noted above, in *Everson* parents were reimbursed for bus fares paid to send children to parochial schools and in *Allen* textbooks were loaned directly to the children. *But those decisions make clear that, far from providing a per se immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.*

Id. at 781. (Emphasis supplied).

To permit the child benefit theory to be extended in such a way as to permit public funds to be used for the providing for teaching staff on the premises of parochial schools would place form over substance. In fact, there would be no logical stopping point. What is the constitutional distinction between sending a teacher to a parochial school to provide remedial reading services and sending a teacher to a parochial school to teach reading itself? In both instances, services are directly related to the advancement of the religious missions of the schools whose pupils' learning abilities such services are designed to assist.

In *Wolman v. Walter*, *supra*, this Court faced an attempt by the State to use the child benefit theory to furnish instructional materials to nonpublic schools by claiming that the instructional materials were actually being furnished to the children and not to the schools. This Court, however, struck down this law stating that "even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." *Id.* at 250.

The constitutional violation in this case is even clearer than in *Wolman*. In that case the Court was concerned merely with neutral and secular educational material and equipment. In this case we are concerned with teachers, a substantial portion of whom are of the same religious faith as the church which operates the schools in which they teach. Here we are dealing with teachers acting on an individualized basis with small groups of children. It is submitted that the decisions in *Meek* and *Wolman* stand for the proposition that the "child benefit" theory will not be permitted to validate a program whereby public school instructors teach within the four walls of a parochial school. In fact, in *Everson*, although the Court there upheld public payment of bus transportation on the grounds that the children were merely "receiving the benefits of public welfare legislation," it nevertheless stated in strongest dictum that this was as far as the Establishment Clause would extend. This Court in *Lemon*, *supra*, at 624 correctly observed that in

constitutional adjudication some steps which, when taken, were thought to approach "the verge" have become the platform for yet further steps. This Court should not permit such further erosion. "[C]ourts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded." *Lynch v. Donnelly*, *supra* at 1370 (O'Connor, J., concurring).

In *Wheeler v. Barrera*, 417 U.S. 402 (1974), this Court reviewed a case that arose in Missouri relating to Title I. In *Wheeler* the Court considered two issues—one, whether Title I required the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students; and two, whether the requirement, if it exists, contravenes the First Amendment. The Court, however, concluded that it could not reach a decision on either issue on the record before it. Nevertheless, Justice Douglas, in a dissenting opinion, noted:

Federal financing of an apparently nonsectarian aspect of parochial schools' activities, if allowed, is not even a subtle invasion of First Amendment prohibitions. . . . Allowing the State to finance the secular part of a sectarian school's program "makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries."

Id. at 431. (Douglas, J., dissenting).

Justice Powell, in a concurring opinion in *Wheeler*, agreed with the majority that in the posture that the case was then before the Court, it was "unnecessary to decide whether the assignment of publicly employed teachers to provide instruction in sectarian schools would contravene the Establishment Clause of the First Amendment." However, he added, "I would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools," citing *Committee for Public Education v. Nyquist*, *supra*. *Id.* at 428. (Powell, J., concurring).

IV. THE PROVIDING OF TEACHING SERVICES BY PUBLIC SCHOOL TEACHERS WITHIN CHURCH SCHOOLS CREATES THE POTENTIAL FOR EXCESSIVE GOVERNMENTAL ENTANGLEMENT AND IS THUS UNCONSTITUTIONAL.

In their brief, the government rejects the contention that the Title I program creates excessive entanglement between church and state. However, the government seems to primarily deal with entanglement in the context of government surveillance claiming that "the surveillance at issue here involves only *public school* teachers and *public school* authorities." (Brief for the Secretary of Education, p. 37). The government's brief then notes "[s]uch surveillance obviously entails no relationship between the government and religious authorities." *Ibid.*

The government ignores the practicalities resulting from the Title I program being conducted on the premises of parochial schools. Unfortunately, here we are not dealing merely with surveillance of public school teachers by public school authorities. The Federal Government requires that a parochial school in which a Title I program is located provide facilities which are religiously neutral. To be religiously neutral the Title I program must be free from all religious objects, including religious symbols (see Brief for the Secretary of Education, p. 12). Therefore, it is not surprising that from time-to-time administrators of church schools may not kindly accept the regulatory demands that they strip any portion of their facility of religious symbols.⁷ Government can run afoul of the Establishment

⁷ Mr. John Schmiedeler, Superintendent of Schools for the Diocese of Kansas City-St. Joseph, testified in *Wamble v. Bell*, *supra*, concerning an incident following an inspection of Our Lady of Americas School in connection with the Title I litigation. Following the inspection, the principal of the school was told that she should take the crucifix down from the Title I room. The principal thereupon took the matter to the parochial school board creating sufficient controversy to require the diocesan superintendent of schools to discuss the matter with the bishop. The bishop ultimately ordered the removal of the crucifix. Mr. Schmiedeler, at the *Wamble* trial, testified that "the principal indicated that the pastor and their local school board, which

Clause by "excessive entanglement with religious institutions, which may interfere with the independence of the institutions. . . ." *Lynch v. Donnelly*, *supra* at 1366 (O'Connor, J., concurring).

The parochial school student is under the control and supervision and subject to the discipline of the church school during the full time that the student is at the parochial school whether the student is receiving instruction from the church-school teacher or a Title I public employee.⁸

Serious questions may well arise as to who has the authority for the disciplining of students while in the Title I room, whether the rules and regulations apply during the time that a parochial school student is attending classes in a Title I room, whether the Title I teacher may use the principal to discipline a child for transgressions which have occurred during the time the child has been in the Title I room, and whether the Title I teacher should enforce the disciplinary rules of the school. Other examples of possible conflict between the church-school authorities and the Title I public school employees include the potential for scheduling disputes and even the question as to whether a private school student, not attending a parochial school where a Title I program is provided, can be admitted onto the facilities and into the program without enrollment in

represented the parents, were somewhat aghast at the thought of taking the crucifix down in one of their classrooms." (Schmiedeler testimony, 19 Tr 197-198 (38a-39a), 201 (40a); see also Hagan testimony indicating that the removal of the crucifix was a big decision because it was an object of reverence, 7 Tr 24, 25-26) (10a-13a).

⁸ According to the current Federal Project Officer for the United States Department of Education, a principal of a particular school is ultimately responsible for any child enrolled in a private school. However, during the time a child is in a Title I classroom, the child is also subject to the Title I teacher's supervision and control (Williams-Madison testimony, 13 Tr 111) (34a). According to the Federal Project Officer, although the principal may have control over the person of the student when the student is in the Title I room, the parent, by agreeing, to let the child receive Title I instruction, relinquishes, to some degree, some responsibility to the Title I teacher (William-Madison testimony, 13 Tr 117-118) (34a-36a).

the parochial school itself. Excessive entanglement may also occur when a religious institution is granted "access to government . . . not fully shared by nonadherents of the religion." *Ibid.* See *supra*, n.6.

It is evident that State interference with the autonomy of the church, since it controls the site and the providing of remedial services on the premises, is always a matter of concern between a church and the public school authorities. In fact, some churches operating church-schools have refused Title I services simply because they do not want such government intrusion.⁹

In *Lynch v. Donnelly*, *supra*, at 1364, this Court referred to *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), where an important governmental power—a licensing veto authority—had been vested in churches. This Court held that giving such authority to a church was unconstitutional. The Title I program, in essence, grants to churches operating parochial schools veto power over a child's receipt of benefits under Title I. If a parochial school decides that it will not agree to a Title I program on its premises or refuses to remove its religious symbols or otherwise relinquishes a part of its autonomous control over its facilities and its students, it is the needy student who is excluded. A program providing for remedial education to students predicated upon agreement between church and state, therefore permits the student's entitlement to Title I services to be subject to a veto by a church institution.

The majority of this Court in *Lynch v. Donnelly*, *supra*, at 1358, noted that "the purpose of the Establishment and Free Exercise Clauses of the First Amendment is 'to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.' *Lemon v. Kurtzman*, 403 U.S. 602, 614. . . ." Although the Court in *Lemon* also acknowledged that total separation is not possible in an absolute sense this Court has never abandoned its concern, as expressed by Justice O'Connor, that institutional entanglement is an evil with

⁹ Cheatham testimony, 12 Tr 114-122 (24a-31a).

which the Establishment Clause of the First Amendment is concerned. *Id.* at 1366 (O'Connor, J., concurring). Title I programs existent in the various states of the Union daily present the imminent potential of institutional entanglement.

The majority in *Lynch* found no entanglement with reference to the display of the creche noting that in that situation "[t]here is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the creche." *Id.* at 1364. Unlike the situation existing in *Lynch v. Donnelly*, however, there is not only initial contact with church authorities concerning the content or design of the Title I program on the premises but there is daily contact regarding sensitive questions.

V. APPELLANTS' CONTENTION THAT THE CHURCH SCHOOLS IN WHICH TITLE I SERVICES ARE PROVIDED DO NOT DUPLICATE THE "PROFILE" OF *MEEK v. PITTINGER* DOES NOT SAVE THE TITLE I PROGRAM FROM ESTABLISHMENT CLAUSE CHALLENGE.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court held that church-affiliated elementary and secondary schools are pervasively religious or sectarian, thus preventing government grants to partially finance teachers of non-religious or secular subjects in such schools because of the entangling surveillance that would be required. Subsequent to *Lemon*, a three-judge court in *Public Funds for Public Schools of New Jersey v. Marburger*, 358 F.Supp. 2933-34 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1973), stated:

While in some instances it may be that religious values do not affect the content of the secular education provided by these institutions, it is clear that the purpose of such religious-affiliated schools is, in substantial part, to teach and thus advance a given religious faith. The Supreme Court has "long recognized that religious schools pursue two goals, religious instruction and secular education," *Board of Education v. Allen*, *supra*, 392 U.S. at 245, 88 S.Ct. at 1927; that, further, "the *raison d'être* of parochial schools is the propagation of a religious faith." *Lemon v.*

Kurtzman, supra, concurring opinion of Justice Douglas, 403 U.S. at p. 628, 91 S.Ct. at p. 2118. Accordingly, we are satisfied that the nonpublic schools which have participated in the New Jersey Aid to Nonpublic Schools Act are, and will be, for the most part, church-related or religious-affiliated educational institutions.

In *Meek v. Pittenger, supra*, at 366, this Court cited and took judicial notice of the characteristics of church-affiliated schools, as discussed in Freund, "Public Aid to Parochial Schools," 82 Harv. L. Rev. 1680, 1688-1689 (1969), in invalidating the use of public funds for church-affiliated schools.

Nowhere has this Court stated that the answer to ten questions about the nature of an institution determines whether it is pervasively sectarian. It is true that in *Meek*, the Supreme Court referred to the complaint in that action which alleged that the statutory provision under attack was a law respecting the establishment of religion in violation of the First Amendment because it authorized and directed payments to or use of books, materials, and equipment in schools which allegedly had ten specified characteristics. *Id.* at 355-356. One looks in vain in the *Meek* decision or any other decision of this Court for a suggestion that ten characteristics, which the counsel in *Meek* suggested were a profile representation of the schools therein, are the beginning and end of all inquiry on the subject of what is a pervasively sectarian institution.

In *Wolman v. Walter, supra* at 235-236, this Court made reference to the three-judge lower court decision. Of significance is the district court's decision, 417 F.Supp. 1116, 1117 (S.D. Ohio 1976), wherein the court noted many aspects of the so-called *Meek* profile characteristics were missing. The Court, however, found no difficulty in holding to the *Lemon* finding that church-affiliated elementary and secondary schools are sufficiently religious to invalidate public aid to them in spite of the points of distinction which the district court's opinion in *Wolman* noted.

Clearly, this Court in deciding these sensitive constitutional questions has never felt that it was wedded to a legalistic definition of what is and what is not sectarian. In *Committee*

for *Public Education and Religious Liberty v. Nyquist*, *supra*, at 767-768, this Court stated that the schools "may vary widely from the supposed profile."

It is submitted that there is no logic in the argument that unless a church forces a student to become a member of its faith, it is somehow less sectarian than those institutions which seek to influence religious thought by more subtle and sophisticated means.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court indicated its concern for the potential of government entanglement in church institutional affairs.¹⁰ If it

¹⁰ This Court may take judicial notice of the amicus brief filed by the U.S. Catholic Conference in *NLRB v. Catholic Bishop of Chicago*, No. 77-752. On p. 1 of their Brief, the United States Catholic Conference states that it is the agency of the Catholic bishops of the United States. On page 2 of their Brief they further stated:

It is the concern of the USCC that the fulfillment of the mission of the Roman Catholic parochial school system not be interfered with by the jurisdiction of a Federal agency concerned with labor relations over the schools' teachers.

In 1978, 9,202 Catholic elementary and secondary schools served the educational needs of almost three and one-half million students. The Bishops of the United States and the USCC are committed to the belief that Catholic schools fulfill a crucial mission; that is, of providing an educational environment in which children and young people can "experience learning and living fully integrated in the light of faith. . . . Students are instructed in human knowledge and skills, valued in deed for their own worth but seen simultaneously as deriving their most profound significance from God's plan for His Creation."

The quoted portion of the preceding paragraph is from the National Conference of Catholic Bishop's pastoral letter of November, 1972, entitled "To Teach as Jesus Did."

On page 11 of its Brief, the Catholic Bishop acknowledged that the Roman Catholic school system in this country is a component of the Roman Catholic Church, stating:

In the instant situation, the National Labor Relations Board (NLRB) has, *sua sponte* taken upon itself jurisdiction to regulate an activity of a component of the Roman Catholic Church. By virtue of its decision to so extend its jurisdiction, the NLRB has sought to establish a more or less permanent institutional attachment to the sectarian institutions at issue here. The question which such a presence poses is whether or not the institutional integrity of the sectarian institution has been compromised. If it has, then we submit that the government has violated

is constitutionally improper for the government to delve into the religiousness of a school to determine whether the National Labor Relations Board has jurisdiction over the Catholic lay teachers employed by the Roman Catholic elementary and secondary school system, it would seem equally violative for the court to become involved with dissecting the religiousness of elementary and secondary schools to determine entitlement to taxpayer's support.

There is no statutory limitation in Title I nor any regulatory provision limiting the services provided on-premises to students attending church schools to those schools that are not "pervasively sectarian."¹¹

It is respectfully submitted that courts are prohibited by the proscription of the First and Fifth Amendments from dividing church-affiliated elementary and secondary schools into two classes, those that are "too" religious or sectarian, and those

the First Amendment guarantees of the Free Exercise Clause of the United States Constitution.

And finally, at page 14 of its Brief, the Bishop on behalf of the Roman Catholic Church's parochial school system, states:

Rather, we are speaking of the vital institutional qualities which go to the very root of the institution, *qua* institution, and mingle inextricably with matters of belief and spiritual orientation. In the instant case, the dispute involves the relationship which is to exist between teacher and employer in a school, a relationship which this Court has repeatedly held to be of signal import to the institutional character of the school. *Meek v. Pittmyer [sic]*, 421 U.S. 349 (1925) [sic]. Inevitably, the dispute touches upon the manner of resolving—in the *locus* of authority for resolving—such questions as *who* shall teach in a school and *under what conditions*. But, given the nature, mission, and sponsorship of the schools involved, these are not questions to be resolved by government. For it to presume and act otherwise is a violation of the Free Exercise Clause. The government, through the NLRB, has asserted that it has a determinative role to play in the definition of this relationship. In our view, because the matter involves the integrity of the institution, government does not have such a role, and, equally to the point, the right to say yea or nay with respect to a proposed government intervention of this nature must, under the First Amendment, reside with ecclesiastical authorities.

¹¹ As far as the United States Department of Education is concerned, Title I services are provided to students attending church schools regardless of the degree of religiousness of those schools (Cheatham testimony, 12 Tr 41-45) (15a-19a).

that are less religious in determining whether public funds or benefits may be provided to church schools under a general federal education aid program.¹²

VI. THE NEW YORK ON-PREMISES PROGRAM IS NOT THE LEAST ENTANGLING ALTERNATIVE AVAILABLE.

The government has attempted to prove the necessity for a on-premises program by reference to a claimed "full investigation" by the Department of Education involving a study in Missouri (Brief for Secretary of Education, p. 10 and n. 9).¹³

¹² Professor Donald Giannella has observed that a determination of the degree of religiosity would involve the judiciary in the kind of entanglement which the Court has been trying to avoid in First Amendment cases. Professor Giannella also stated that if a highly refined and particularistic test were adopted by the court with reference to the religiosity of the schools some schools and religions would inevitably register plausible complaints of invidious discrimination or lack of equal treatment as the dividing line was etched out case-by-case. Professor Giannella suggested that when judicial decisions turn on such "elusive" and "ephemeral" matters concerning religion, entanglement seems excessive, and equal treatment of religion in schools is seriously endangered. Giannella, "Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement," 1971 The Supreme Court Review 147 at 181.

¹³ The validity of this study has been directly attacked in the case of *Wamble v. Bell*, *supra*. No decision has yet been rendered in that case, however, one of the issues raised in that case is whether in fact the Commissioner's decisions to invoke the by-pass provisions of 20 U.S.C. § 2740(b) in Missouri were supported by substantial evidence.

On January 22, 1976, after the Missouri study was completed by the United States Department of Education, Arthur L. Mallory, Commissioner of the Department of Elementary and Secondary Education of the State of Missouri, directed a letter to the Honorable T. H. Bell, U.S. Commissioner of Education, in response to the findings of Dr. Bell which were generated by the Missouri report. (See letter from Arthur L. Mallory to T. H. Bell dated January 22, 1976 (1a-9a).

Perhaps more significant was a June 24, 1976, memorandum from Assistant Commissioner John Rodriguez of the United States Office of Education which was directed to Deputy Commissioner Robert Wheeler of the United States Office of Education. In that memorandum Mr. Rodriguez opined that: "the non-public school officials who complained about Title I services in Missouri seemed to base their complaint in part on the assumption that

In *Walz v. Tax Commission*, 397 U.S. 664 (1970), this Court seemed to opt for approving the least entangling alternative available when there was a potential for excessive entanglement. In *Walz*, the Court recognized that failing to give tax exemptions could create more entanglement problems than granting an exemption. The Court specifically noted that exemptions restrict the relationship between church and state and tend to complement and reinforce the desired separation insulating each from the other. *Id.* at 676. Here, the least entangling alternative would be a program operated on a completely religiously-neutral site.

before or after school services are 'inherently' not equitable if public school students receive such services during the school day." Mr. Rodriguez then stated "there is no empirical evidence to substantiate or support this assumption. It is attitudinally derived."

The memorandum from Associate Commissioner Rodriguez further stated:

There is, however, substantial evidence that a positive correlation exists between the quantity of education and school achievement. From this evidence we can deduce with reasonable justification that before or after school, school services increases the quantity of a student's education and therefore benefits him in excess of what he would receive if services were provided during the school day. It is assumed in this deduction that quality education is being provided. Serious attention should be given this argument. I am willing for the sake of argument in our session on the by-pass report with the Commissioner to take such a position.

(See memorandum dated June 24, 1976, from the desk of the Associate Commissioner reproduced in full and attached at 9a-10a).

The Director of Compensatory Education Wilbert A. Cheatham, the federal official who at the time of trial in *Wamble v. Bell* was responsible for Title I nationwide, agreed that there was no empirical evidence to refute Rodriguez's view (Cheatham testimony, 12 Tr 57) (20a). Mr. Cheatham also agreed that there is some substance to Rodriguez's view that private school officials' complaint was attitudinally derived (Cheatham testimony, 12 Tr 59) (21a).

In addition, Mr. Cheatham indicated that there was no comparative study of the results of various types of Title I instructional programs (Cheatham testimony, 12 Tr 132-135) (31a-33a). Nevertheless, 99% of the Title I programs in the country are on-premises during hours programs. However, in the early '70s mobile reading labs were popular. (Cheatham testimony, 12 Tr 93-94) (23a-24a).

The government indicated that the Board of Education considered holding the remedial classes for nonpublic school students in the public schools during school hours, but that this plan was abandoned because of concerns that it would violate the New York Constitution (Brief for the Secretary of Education, p. 9).¹⁴

In *Wheeler v. Barrera*, *supra* at 424, n.20, this Court set forth a listing of possible Title I programs suggested to the Senate Committee which was dealing with Title I legislation. This list included instructional media centers, television and radio instruction, and mobile learning centers. Each of these suggestions would provide a less entangling alternative and a more religiously-neutral arrangement for the providing of Title I services to students attending nonpublic schools. The government has failed to demonstrate why these or other alternatives would not be viable. See also *Wolman v. Walter*, *supra* at 247, n.14 for a discussion concerning the use of public centers or mobile units near the nonpublic school premises; also *Wheeler v. Barrera*, *supra*, at 425, suggesting the use of neutral sites to replace on-the-premises instruction.

CONCLUSION

In attempting to cope with the day-to-day reality of a similar program, the Rhode Island Federal District Court faced the question squarely and held, "[a] parochial and a public school are not merely sharing in a building; they are sharing the same students. The two schools at best effectuate a partnership, if not for all intents and purposes a complete merger. Extensive contacts between the two facilities and administrations are inevitable as they seek to protect the welfare of their common

¹⁴ In an illuminating article dealing with the constitutionality of Title I, John W. Calhoun, the Assistant Attorney General in Wisconsin, has suggested that the on-premises program should be scrapped in favor of a dual enrollment program. The author suggests in his article that "a Supreme Court ruling establishing dual enrollment as a constitutional right of students attending nonpublic schools" would facilitate such a solution. Calhoun, "The Elementary and Secondary Education Act and the Establishment Clause," 9 Val. U. L. Rev. 487 (Spring, 1975).

~~student body.~~ " Thomas v. Schmidt, 397 F.Supp. 263, 214 (D. R.I. 1975).

A Title I program providing for services administered by public school teachers within the confines of a church-operated school fails both the primary effect test and entanglement test and must be struck down. In order to be faithful to the teachings of this Court, the Title I program for nonpublic school students should be provided at neutral sites. Therefore, the holding of the Court of Appeals should be sustained.

Respectfully submitted,

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